

Sentencing white-collar offenders: Beyond a one-dimensional approach

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ABSTRACT

The increasing prevalence of white-collar crime should prompt South African courts and legislators to consider the efficacy of sentences for these offenders. This article will define white-collar crime, discussing its theoretical ambiguities. It will then focus on the current sentencing of white-collar offenders in South Africa. A sentencing study on white-collar crime in the United States reveals that courts take account of various factors concerning the nature of the act and the actor. South African courts justify their sentencing decisions on similar factors, but also emphasise deterrence. Deterrence should not be given undue weight as the constitutional principle of proportionality must guide the courts. Imprisonment tends to be the preferred sentence for white-collar criminals, but there are constitutional, empirical and pragmatic issues with imprisonment, particularly the overcrowding of prisons. The courts should instead utilise community sentences for white-collar criminals who are not violent and can contribute their professional skills to society. South Africa requires greater resources for the administering of community sentences, and possibly, new legislation, such as the United Kingdom's Criminal Justice Act of 2003. Consideration of foreign legislation combined with increased resources would assist the effective implementation of community sentences for white-collar criminals in South Africa.

PART I: INTRODUCTION

A rapidly emerging issue in the criminal justice system is the manner in which to investigate, prosecute and sentence white-collar criminals. This article focuses on the sentencing of white-collar criminals. Despite its devastating economic impact, white-collar crime has received relatively little attention from academics and even less constructive comment from the courts in the realm of sentencing. Part of the dilemma arises from the complex nature of white-collar crime and its insidious presence in the 'organisational culture'¹ of business.

This article is divided into four parts which address various aspects of sentencing white collar crime. Part one of this article is introductory, whilst part two will define white-collar crime and introduce

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¹ N Shover and A Hochstetler *Choosing white-collar crime* (2006) 161.

the ambiguities surrounding the concept. It will also investigate the consequences of white-collar crime, which are of particular importance as they have a bearing on the sentencing approach of courts. Part three will assess the treatment of white-collar criminals by the courts. The courts in South Africa appear to weigh a number of factors in determining a suitable sentence for white-collar criminals. A critical flaw is the emphasis the courts place on the notion of deterrence. The danger of focusing on deterrence is the justification of exemplary sentences of imprisonment for white-collar criminals. Finally, part four of this article will argue that community penalties form a viable and appropriate punishment for less severe cases of white-collar crime. The courts appear to adopt a one-dimensional approach to sentencing white-collar criminals by choosing imprisonment to the exclusion of non-custodial sanctions. Prisons in South Africa are operating under great strain because of over-crowding. Imprisonment is demanding on resources, has minimal restorative and rehabilitative consequences for offenders and its effectiveness as a deterrent is uncertain. These difficulties with imprisonment suggest community sentences are preferable for white-collar criminals. Not only are white-collar criminals positioned to make a productive contribution to society in terms of community orders, but they are also usually non-violent offenders who should not pose a risk to communities when re-integrated.

There are two obstacles to using community penalties for white-collar criminals in the South African context and moving away from the reliance on imprisonment. First, community orders are seen as lenient punishment thus there is a reluctance to utilise them, second, the severity of this type of sentence is difficult to measure. Von Hirsch and Wasik have suggested that the courts gauge severity in terms of the impact of the order on the living standards of the offender. This is compatible with the constitutional requirement of proportionality and a workable manner in which to utilise the community penalty as a sentence. The practical implementation of this theoretical understanding can be seen in the Criminal Justice Acts of 1991 and 2003 in the United Kingdom. They provide an example, which the South African criminal justice system can investigate and consider further guidelines and legislation to implement community sentences more effectively.

PART II: DEFINING WHITE-COLLAR CRIME

Definitions

A workable conception of white-collar crime is a necessary starting point to set the parameters for this discussion, besides being important for the comparability of empirical investigations and theoretical dis-

cussions.² Although earlier sociologists had taken note of white-collar crime, Edwin Sutherland is attributed with conceptualising white-collar crime.³ He described it as 'a crime committed by a person of respectability and high social status in the course of his occupation'.⁴ One of his aims was to force criminologists and other criminal justice professionals to evaluate the assumptions made about class and criminality — namely that criminals come only from lower social classes.⁵

Following its recognition as a category of crime, the definition of white-collar crime has been an area of difficulty and debate. The founding definition of Sutherland has been challenged on a number of grounds. The central criticism of his definition is that it emphasises class bias 'at the expense of the offences themselves'.⁶ Other criticisms of the definition include the ambiguity surrounding the terms 'respectability' and 'high social status' as well as the fact that it arbitrarily excludes certain white-collar crimes.⁷ Subsequently, the emphasis in the definition of white-collar crime has, according to most criminologists, shifted away from the distinguishing factors of class, status and respectability.⁸

The ensuing search for an appropriate conceptualisation of white-collar crime has yielded varied responses. One reaction has been to question the necessity of providing 'precise parameters' at all when the concept of white-collar crime, by its nature, retains a 'certain fuzziness'.⁹ Certainly the 'fuzziness' of white-collar crime is the cause of much debate. Besides the definition, the ambiguities surrounding white-collar crime feature in two other important areas, namely: the causes of white-collar crime; and, its regulation and sentencing.¹⁰ Of

² D Nelken 'White-Collar Crime' in Maguire et al (eds) *The Oxford Handbook of Criminology* (2002) 844 at 847.

³ G Geis 'White collar crime: What is it?' (1991-2) 3 *Current Issues in Criminal Justice* 9 at 11. See M Benson and F Cullen 'White-collar crime: Holding a mirror to the core' (1993) 4 *Journal of Criminal Justice Education* 325 for a historical perspective on white-collar crime over the past seventy years.

⁴ E Sutherland *White-collar Crime: The Uncut Version* (1983) 7.

⁵ M Dixon 'The re-defining of white-collar crime' (1994-5) 13 *Dickinson Journal of International Law* 561 at 562.

⁶ H Croall *White-Collar Crime: Criminal Justice and Criminology* (1992) 9. See for example J Braithwaite 'White-collar crime' (1985) 11 *Annual Review of Sociology* 1.

⁷ R Posner 'Optimal sentences for white-collar criminals' (1980) 17 *American Criminal Law Review* 409.

⁸ Croall op cit (n6) 9; Dixon op cit (n5) 565; S Green 'The concept of white-collar crime in law and legal theory' (2004-5) 8 *Buffalo Criminal Law Review* 1 at 8.

⁹ Geis op cit (n3) 10. T Hirschi and M Gottfredson argue that white-collar crime should not be a distinct category at all as there is little difference between it and street crime. Rather it complicates the understanding of the causes of criminality in general. See 'Causes of white-collar crime' 25 *Criminology* 949.

¹⁰ Nelken op cit (n2) 847.

these various ambiguities, only the definition and the regulation of white-collar crime are relevant to this discussion.

The most common escape from the criticism of Sutherland's definition is to focus on the nature of the crime rather than class connotations as defining white-collar crime — that is, it is committed in the course of the occupation of the offender and is usually of economic significance. According to an accurate and simple definition by Croall, white-collar crime 'is crime committed in the course of legitimate employment and involves the abuse of an occupational role'.¹¹

The strength of this definition is that it emphasises the importance of the circumstances in which white-collar crime occurs — the offender is in a specific working environment and usually in a position of trust.¹² Another characteristic flowing from this definition is the low visibility of white-collar crimes because they are committed in a private occupational scene at which the offender is often legitimately present. Such crimes are typically complex because they involve a level of expertise. They are consequently difficult to detect and prosecute and require a reactive, as opposed to a preventative, response in terms of policy and legislation.¹³ Thus, the definition of Croall, focusing on the nature of the crime, is more useful for the purposes of this article and more practical in light of the flawed theory of Sutherland.¹⁴

Organisational crime versus corporate crime

Blankenship and Geis have suggested a partitioning of the 'domain' of white-collar crime into 'major types'.¹⁵ For the purposes of this discussion on sentencing, a useful distinction can be made between organisational crime and corporate crime. The former focuses on offences committed by individuals in their occupation or against their employers, within organisations, while the latter constitutes 'illegal criminal behaviour which is a form of collective rule-breaking in order to achieve organisational goals'.¹⁶ The nature of juristic persons as white-collar offenders yields different options for punishment and sentencing in comparison to those available for natural persons engaged in such crimes. Questions of imprisonment and community service

¹¹ Croall op cit (n6) 9.

¹² The emphasis on the element of abuse of trust by white-collar offenders is often attributed to the work of S Shapiro in 'Collaring the white-collar crime, not the criminal: reconsidering the concept of white-collar crime' (1990) 55 *American Sociological Review* 346 in D Nelken (ed) *White-Collar Crime* (1994) 13.

¹³ Croall op cit (n6) 12.

¹⁴ Nelken op cit (n2) 855.

¹⁵ Braithwaite op cit (n6) 19.

¹⁶ Croall op cit (n6) 11.

usually arise only with regard to human individuals. Consequently, the focus of this discussion will be organisational crimes.

In practice, cases of white-collar crime frequently involve both instances of corporate crime and organisational crime, exacerbated by the difficulty in separating the criminal activities of the individual in a corporation from those of the corporation as an artificial entity. The recent plea bargain entered into by the State with Graham Maddock, the financial director of Fidentia, and his chartered accounting firm, Maddock Incorporated, is indicative of the close relationship between juristic entities and the people working for them.¹⁷

Two other ambiguous elements of the definition require explanation. First, the label of white-collar crime has been used for a wide range of crimes. Some criminologists include as white-collar crime, contraventions of environmental regulations regarding pollution levels by industries and crimes against the consumer.¹⁸ While the seriousness of these crimes should not be underestimated, this article does not purport to deal with many of these assorted white-collar crimes. Rather, the focus is on white-collar crimes of fraud and theft in the occupational setting.¹⁹

Second, even within the category of fraud as white-collar crime, there is much variance in the seriousness of the offence.²⁰ For instance, fraud can happen on a limited scale involving one victim and only a small amount of money or a vast number of people can be defrauded of millions, as in the case of the Fidentia matter. The variance in seriousness has implications for a discussion on the consequences of white-collar crime.

Consequences of white-collar crime

In the sentencing process, the court considers a number of consequences resulting from the crime. The consequences of white-collar crimes are generally laid out as financial, physical and social. White-collar crime is conventionally assumed to result in economic loss of

¹⁷ Maddock Incorporated received R60 million in fines, suspended for five years, while Maddock received a seven-year imprisonment sentence. See IOL 'Jailtime for Fidentia's finances man', 4 February 2008, available at http://www.iol.co.za/index.php?set_id=1&click_id=3045&art_id=nw20080201164501807C415090, accessed on 4 April 2008.

¹⁸ S Box *Power, Crime and Mystification* (1998) 27.

¹⁹ Croall op cit (n6) 28 notes that not all fraud is committed in the course of the offender's occupation and therefore should not be properly considered white-collar crime. Hence, there is the need to identify the specific cases of fraud with which this discussion is concerned.

²⁰ The notion of severity will be considered below in Part IV of this paper.

varying proportions.²¹ This is not to say that the crime does not have other measures of significance, but it usually involves this economic element, as opposed to violence or force.²² According to Schlegel and Weisburd, 'violence is not prevalent enough in white-collar offending to be seen as a general indicator of crime seriousness'²³ so there is a need for other indicators of seriousness.

A significant social issue identified in recent studies is the manner in which white-collar crimes are responsible for undermining the foundational trust on which society is based.²⁴ Shapiro gives substance to the notion of trust in white-collar crime by referring to the fiduciary relationship in which there is an absence of direct control by the beneficiary and therefore potential for abuse.²⁵ In *S v Gardener*,²⁶ Uijs AJ elucidated this idea when he commented that 'business, economic enterprise, economic intercourse is based on trust'. Geis mentions a similar concern when he comments that white collar crimes are more serious than offences committed by 'the run-of-the-mill traditional kinds of offenders' because they are 'more threatening to the integrity of society'.²⁷

Many discussions of white-collar crime draw attention to the informal sanctions of social and public embarrassment imposed on white-collar offenders by the prosecutorial process, such as the loss of their jobs, loss of reputation and, possibly, the loss of their friends' and families' support. Szockyj mentions that 'because of their position in society',²⁸ white-collar criminals may suffer more social stigmatisation and exclusion than conventional criminals. In the case of *S v Blank*,²⁹ the court acknowledged the social costs to the offender, as being the loss of his job, the fact that he could never practise again in his chosen profession and the immense social embarrassment that he had suffered from the widespread publicity around the case.

²¹ Conklin (1977) mentioned in Box op cit (n18) 20.

²² Box op cit (n18) 20, claims that there is and can be violence in white-collar crimes and this destructive potential is underestimated in convictions of offenders and general public perception.

²³ K Schlegel and D Weisburd 'Returning to the mainstream: Reflections on past and future white-collar crime study' in Schlegel and Weisburd (eds) *White-Collar Crime Reconsidered* (1992) 352 at 359.

²⁴ Nelken op cit (n2) 846.

²⁵ Shapiro op cit (n12) 348.

²⁶ *S v Gardener* (C) case no SS32/06 23 April 2007, unreported at para 83.

²⁷ G Geis and M Blankenship 'Is incarceration an appropriate sanction for non-violent white-collar offenders?' in C Fields and S Egger *Controversial Issues in Corrections* (1999) 155 in E Szockyj 'Imprisoning white-collar criminals?' (1998-9) 23 *Southern Illinois University Law Journal* 485 at 501.

²⁸ Szockyj op cit (n27) 500.

²⁹ *S v Blank* 1995 (1) SACR 62 (A) at 69C.

Another controversial area regarding the effects of white-collar crime is the absence or presence of victims. In the past, there existed a perception that there are no victims in the conventional sense of white-collar crime.³⁰ This was most likely a result of the difficulty in assessing the exact parties affected by the crimes. It may also have been influenced by the fact that white-collar crime is defined according to the particular circumstantial area of the workplace, not in relation to their victims.

However, there is increasing recognition of a host of actors who can be considered as victims. First, there are other corporations and organisations affected by white-collar crimes, such as in the case of price-fixing and bribery. Second, there are human victims such as taxpayers, shareholders and even the poor — a point highlighted in the media coverage of the Fidentia matter in which widows and orphans were affected by the alleged criminal misconduct of the directors.³¹

It would appear that wherever the emphasis on the various consequences of white-collar crime is placed, will influence the seriousness with which the crimes are viewed. Whereas Geis considers white-collar crimes more serious than street crimes because of his view on the breakdown of trust, Blankenship is of the opinion that violence should be the indicator of seriousness for both street crimes and white-collar crimes — the consequence being that the most serious punishment of imprisonment is not appropriate for white-collar criminals.³² Generalisations as to the seriousness of white-collar crime compared with that of street crime are seldom capable of being sustained in light of the variety of consequences of both types of crime. The debate of Geis and Blankenship relates more to the treatment of white-collar crime in comparison with street crime, but the discussion places emphasis on whether the courts focus on the correct consequences of white-collar crime and whether they ought to be weighing such consequences in a certain manner.

While the court should not rank the effects of white-collar crime in a rigid manner, relying rather on the circumstances of the case, certain results deserve attention from the courts. Violence remains an uncommon occurrence in the cases of fraud and theft dealt with in this article, so it is not an appropriate or helpful consequence on which to concentrate in sentencing such white-collar crimes. It seems clear that abuse of trust should be viewed as important in the context of occupational crimes because of the employee-employer relationship and

³⁰ Box op cit (n18) 17.

³¹ Box op cit (n18) 21-2. See Y Kemp 'Financial Services Firm in Fidentia probe' *Business Report*, 7 February 2007, available at <http://www.busrep.co.za/index.php?fSectionId=&fArticleId=3669027>, accessed on 16 September 2008.

³² G Geis and M Blankenship in Szockyj op cit (n27).

the basis of trust underlying commercial interactions. In addition, the courts ought to take greater consideration of the presence of victims and the effects of white-collar crime on them. These factors will assist courts in assessing the appropriate sentence to fit the crime.

PART III: CURRENT DEVELOPMENTS IN THE SENTENCING OF WHITE-COLLAR CRIMINALS

The aim of this section is to investigate the standards of, and justifications for, the punishment of white-collar criminals observed in South African courts. Despite the wide variety of crimes labelled 'white-collar', the focus will be on cases of fraud and theft. In recent cases, the courts have considered a variety of factors when deciding upon an appropriate sentence for white-collar criminals and the factors considered have affected the sentencing decision and ultimate choice of sentence. While it is hard to identify each and every reason in a sentencing judgment, there have been various studies on the sentencing of white-collar criminals in the United States of America, which suggest an emphasis on certain factors. These factors will be related to the South African context so as to provide a framework to critically consider some of the most important fraud and theft cases of the constitutional era.

Lack of data

By way of preliminary remarks, one should note that a major obstacle to the analysis of the treatment of white-collar crime is the lack of empirical research. Benson argues that it is because of the lack of data that white-collar crime has had a 'small impact'³³ on criminological studies. The lack of data is not necessarily evidence of an absence of interest, but rather because of the scarcity of prosecutions. Croall criticises criminologists who tend to focus on the few examples of the prosecution of high-profile offenders and draw conclusions from these studies.³⁴ She suggests that this reliance on a limited sample leads to atypical results in studies of white-collar crime.³⁵

Despite the increase in white-collar crimes, as noted by the trial court in *S v Blank*, there have not been many reported cases prosecuting white-collar crime.³⁶ Consequently, the discussion of high-profile cases is to be taken rather as a synopsis of the reported punishment of

³³ M Benson 'Book review essay: Criminology and white-collar crime' (1994) 19 *Criminal Justice Review* 100.

³⁴ Croall op cit (n6) 17.

³⁵ Ibid.

³⁶ Squires J in the court *a quo* quoted by Grosskopff JA in *S v Blank* supra (n29) at 73A.

white-collar criminals and not a study from which one can draw broad generalisations regarding white-collar crime in South Africa.

Sentencing factors

One of the few studies on the sentencing of white-collar criminals has been that of Stanton Wheeler and his colleagues in the United States of America in the 1980's. The study used four different types of variables to uncover the influences on judges regarding appropriate sentences for white-collar criminals: act-related, actor-related, legal process and other variables.³⁷ Whereas the variables relating to legal process and those falling into the category of 'other' received only occasional mention in judgments, variables related to the nature of the criminal act and the actor were considered to be very influential on the judgments of the judicial officers in the study and therefore, of greater significance.³⁸

Regarding the nature of the criminal act, the judges would look predominantly at the 'dollar loss'³⁹ from the offence, the amount of complexity involved in the offence, the size of the area across which the criminal activity spread, the nature and number of victims and the maximum period of imprisonment for which legislation allows.⁴⁰ With regard to the actor, factors such as the previous criminal record, the 'impeccability'⁴¹ of the accused in terms of his prior reputation and contributions to society, his present socio-economic status and the role of the accused in the offence were considered. Generally the higher the position of trust the accused had occupied prior to prosecution, the greater the blameworthiness the accused was considered to have by the court.⁴² Two other variables related to the actor were mentioned by judges in the study, both concerning the accused after the commission of the crime — the cooperation of the accused with the investigators and the presence or absence of remorse for the offence.⁴³

In particular, the juxtaposition of impeccable records being a factor in favour of a lighter sentence and the violation of trust putting the accused in a less favourable light is known as the 'paradox of leniency

³⁷ S Wheeler, D Weisburd and N Bode 'Sentencing the white-collar offender: Rhetoric and reality' (1982) 47 *American Sociological Review* 641 at 644.

³⁸ Wheeler et al op cit (n37) 646.

³⁹ Wheeler et al op cit (n37) 644.

⁴⁰ Ibid.

⁴¹ Wheeler et al op cit (n37) 646.

⁴² The Supreme Court of Appeal, in *S v Shaik* 2007 (1) SA 240 (SCA), referred to the trial judge's statement that this axiomatic relationship is a reason for increased blameworthiness of the offender and seriousness of the offence at para 51.

⁴³ Wheeler et al op cit (n37) 646.

and severity'.⁴⁴ This 'paradox of leniency and severity' does not usually arise in the context of ordinary street crimes and is therefore an important distinction in the nature of the sentencing process for white-collar criminals. According to Wheeler et al, it also challenges the perception that wealthier white-collar criminals are less likely to receive a lengthy sentence of imprisonment.⁴⁵ Evidence of these factors can be found when one turns to an analysis of South African cases.

Use of sentencing factors in South African cases

The South African courts appear to have utilised similar factors in justifying the punishment of white-collar criminals over recent years, consistency being a much-desired feature of a criminal justice system. The 'paradox of leniency and severity' has created a tension in the reasoned judgments of courts deciding upon the appropriate sentences for white-collar criminals in cases such as *Gardener*, *Assante* and *Blank*.⁴⁶ On the one hand, the courts considered actor-related factors. The offenders were intelligent and competent employees. The court in *Assante* acknowledged the 'good progress'⁴⁷ of the accused at his place of employment, a banking institution, while the success of *Blank* in his career as a stockbroker was 'meteoric'.⁴⁸ All of these accused were, in addition, first-time offenders. On the other hand, there were numerous factors related to the nature of the act, which led the courts to impose serious sentences.

As one of the initial cases involving significant white-collar crime in the constitutional era, *S v Blank* has been influential in subsequent cases.⁴⁹ A young, successful stockbroker was convicted of 43 counts of fraud amounting to a total of R9,75 million. He was sentenced in the court *a quo* to eight years' imprisonment and his appeal to the Supreme Court of Appeal (against what he considered an exemplary sentence in its severity) was unsuccessful. The appeal court, upon considering the decision of the court *a quo*, considered it to have given thorough reasoning for the sentence. Notably, the court *a quo* had employed many of the factors Wheeler and his colleagues identified in use in the United States of America.⁵⁰ The court *a quo* emphasised the position of trust in which the accused was placed as a stockbroker towards his

⁴⁴ Wheeler et al op cit (n37) 645.

⁴⁵ Wheeler et al op cit (n37) 658.

⁴⁶ *S v Gardener* [2007] JOL 92700 (C) is the judgment with *S v Gardener* (n26) as the sentencing judgment; *S v Assante* 2003 (2) SACR 117 (SCA); *S v Blank* supra (n29).

⁴⁷ *S v Assante* supra (n46) at 120I.

⁴⁸ *S v Blank* supra (n29) at 68G.

⁴⁹ Ibid.

⁵⁰ *S v Blank* supra (n29) at 77E.

own firm, the client of his firm (Old Mutual) and the Stock Exchange, the length of time over which the trust was repeatedly betrayed by the offender, and the magnitude of the fraudulent scheme.⁵¹

In the two more recent reported cases of white-collar crime, the courts again emphasised the element of abuse of trust. In *S v Gardener*,⁵² two directors of LeisureNet Ltd were sentenced to eight and seven years' imprisonment respectively. They failed to disclose an interest amounting to six million rand each, which they had gained from a transaction entered into by LeisureNet with an overseas company. Over a period of four years, they were given at least three opportunities at various LeisureNet board meetings but failed to take steps to indicate their interest to the board.⁵³

The accused in *S v Assante*⁵⁴ was employed in the position of branch manager for NBS Bank and engaged in a dishonest scheme to obtain money in the amount of R345 million from investors, of which the resultant loss for investors was R128 million. Conradie JA expressed extreme concern at the 'immense abuse of trust' by the accused and his criminal behaviour whose effects the court felt were sufficient to 'destabilise the banking industry'.⁵⁵ He acknowledged that although the sentence of 24 years' imprisonment was severe, a sentence of 15 years would have been justified by each of the counts of fraud totalling one million rand or more.⁵⁶ There are a number of other cases in which abuse of trust has largely influenced the decision of the court.⁵⁷

The issue of economic loss or 'dollar loss' has been canvassed by the courts. In *S v Assante*, the accused received an effective sentence of 24 years' imprisonment for 108 counts of fraud in a scheme of 'breath-taking enormity'.⁵⁸ The court specifically referred to the fact that although 'counsel were unable to find a case where a period of imprisonment as long as this had been imposed for fraud',⁵⁹ there had not been a case in which the amounts fraudulently obtained were as large. Earlier in the judgment, he reiterated that the scale of the fraud was a 'seriously aggravating'⁶⁰ factor. In other words, the South African courts, like those analysed in the United States of America, appear to

⁵¹ *S v Blank* supra (n29) at 72A.

⁵² *S v Gardener* supra (n46).

⁵³ *S v Gardener* supra (n46) at para 121-4.

⁵⁴ *S v Assante* supra (n46).

⁵⁵ *S v Assante* supra (n46) at 120B.

⁵⁶ *S v Assante* supra (n46) at 120F. S Terblanche 'Sentencing' (2004) 17 *South African Law Journal* 268 at 277.

⁵⁷ See *S v Shaik* supra (n42) at 73A; *S v Moolman* 2006 (1) SACR 432 (T) at 441C-D.

⁵⁸ Conradie JA referring to Joffe J in the court *a quo* supra (n46) at 119I.

⁵⁹ *S v Assante* supra (n46) at 120I-J.

⁶⁰ *S v Assante* supra (n46) at 120B.

conceive of the severity of white-collar crime largely in relation to the economic loss caused by the criminal offence.

One reason for the court to rely on the economic loss is because in 'crimes of dishonesty, particularly fraud, it is often very difficult for the State to pin down precisely what prejudice was suffered by the victim or victims'.⁶¹ Indeed, the presence or absence of victims does not appear to have been such an influential factor in the cases considered thus far. The courts have seldom referred to the identity of the victims as being significant, perhaps because of the difficulty of identifying them and the prejudice caused to them by the white-collar crime. Often the prejudice suffered by victims is not quantifiable, especially the 'loss of good name and the like'.⁶²

The victims of white-collar crime are usually the employers or employees of the white-collar criminals. They can also be artificial entities such as corporations, like LeisureNet Ltd or Enron Corporation, whose shareholders indirectly suffered loss and whose employees endured the consequences of the loss of employment as well as financial loss.⁶³ Hittner J commented, in the first of a long line of cases concerning the Enron Corporation, that the fraudulent activities of various white collar criminals resulting in the bankruptcy of Enron had affected a 'wide range of victims' including the employees who had lost their jobs, creditors owed money by the entity and those who had owned stock, which ultimately had a 'devastating impact'⁶⁴ on the entire community. This description of the Enron fraud conveys the manner in which loss caused by white-collar crime is dissipated across a large number of people, often with middle and lower income victims bearing the burden of loss in greater proportions.⁶⁵

Shover argues that the analysis of white-collar crime usually concentrates on the costly economic loss as opposed to the victims. As a result, he claims the analysis underemphasises other effects and separates it from 'the harm and seriousness of the problem'⁶⁶ of criminal behaviour. Whereas victims of street crime are given support and attention at the very least, victims of white-collar crime experience little of the same.⁶⁷ However, in the impending case of J Arthur Brown, the former Fidentia director, should the court find him guilty it may well note in

⁶¹ *S v Gardener* supra (n26) at para 41.

⁶² *Ibid.*

⁶³ See the facts of *S v Gardener* supra (n46) and *US v Fastow* 292 FSupp2d 914, 92 AFTR2d 2003-7129, the first of many Enron cases.

⁶⁴ *US v Fastow* supra (n63) at 916.

⁶⁵ Shover et al op cit (n1) 151.

⁶⁶ Shover et al op cit (n1) 159.

⁶⁷ Shover et al op cit (n1) 160.

its final sentencing decision, the nature and number of the victims, including a large number of widows and orphans.

The final two factors related to the actor, and addressed by Wheeler et al, are the cooperation of the accused with the prosecution and evidence of remorse. While the former does not appear to play a significant role, the courts are concerned with the latter — remorse. The courts generally regard a guilty plea to be a *prima facie* sign of remorse.⁶⁸ The repayment of any money gained fraudulently or stolen by the accused has been considered to be evidence of remorse as well.⁶⁹ In *Gardener*, the ‘best thing [the accused] did’⁷⁰ was to repay their profits and include an additional four million rand. However, Uijs AJ accepted repayment as a sign of remorse somewhat reluctantly because he felt there was a clear ‘measure of coercion’ involved which ‘caused [the accused] to pay back’.⁷¹ Therefore it would seem that a genuine, voluntary repayment is valued more highly by the courts. In addition, if the accused has not made restitution by time of the trial despite promising to do so, as in *S v Saeed*,⁷² the court will not be able to take the promise into account as a mitigating factor.

The courts also consider whether the money was used for personal gain.⁷³ In the case of *S v Assante*, the appellant still received a severe sentence in spite of Conradie JA noting that the money had ‘not directly benefited’⁷⁴ him. This can be contrasted with *S v Gardener* where Uijs AJ emphasised that both of the accused were wealthy independent of the six million rand they each received directly from their fraudulent activities, pointing to their greed in committing the fraud.⁷⁵

Emphasis on deterrence

Besides the use of the factors indicated in the Wheeler study, a prominent local trend is the use of deterrence as a sentencing rationale in the treatment of offenders. In *Blank*, one of the central matters on appeal by counsel for the accused was the court *a quo*’s use of an exemplary sentence, justified on the ground of the increase in white-collar crime.⁷⁶ The Supreme Court of Appeal rejected the argument that it was an exemplary sentence, claiming it simply had ‘strong deterrent

⁶⁸ See *S v Assante* supra (n46) at 120I; *S v Blank* supra (n29) at 69F.

⁶⁹ *S v Erasmus* 1998 (2) SACR 466 (SE) at 470B-C.

⁷⁰ *S v Gardener* supra (n26) at para 77.

⁷¹ *S v Gardener* supra (n26) at para 53.

⁷² *S v Saeed* [2006] JOL 17059 (SCA) at para 8.

⁷³ *S v Moolman* supra (n57) at 441E.

⁷⁴ *S v Assante* supra (n46) at 120I.

⁷⁵ *S v Gardener* supra (n26) at para 93.

⁷⁶ *S v Blank* supra (n29) at 73A.

effect'.⁷⁷ The court felt that the chosen sentence was justified in light of the evidence that illegal behaviour may be increasingly tolerated on the stock exchange.⁷⁸

In the High Court case of *S v Howells*,⁷⁹ Van Heerden AJ did not consider the magistrate to have attached undue weight, on a need for deterrence and the increase in fraud and theft by persons in fiduciary positions. In *S v Gardener*, Uijs AJ in the sentencing judgment, deemed it 'indubitably...in the interests of society that people be told by way of sentences...that crime does not pay'.⁸⁰ He enquired with a measure of self-consciousness about '[the] message' that he would 'send out to the public'⁸¹ under the label of the interests of community. By this, he was implying a need to use the sentencing of those two directors, Gardener and Mitchell, as a general deterrent to potential white-collar criminals. Upon evaluating the appeal of the accused against his sentence in *S v Assante*, Conradie JA likened the 'alarming increase in white-collar crime'⁸² to a 'scourge'.⁸³ Like the other judges drawing attention to the frequent occurrence of white-collar crime, he was accurate and correct in his concern. However, deterrence is but one of many factors and rationales to be weighed in the sentencing process and should not be too heavily emphasised.

The frequent reference to deterrence by South African judges in cases of white-collar crime can be contrasted with increasing criticism of it as a sentencing aim in the past twenty years. According to many theorists, the use of deterrence has lost its attraction for a number of reasons including the lack of evidence regarding its effectiveness, its use of the accused as a means to an end and the assumptions underlying it regarding the rationality of offenders.⁸⁴

In particular, deterrence as a rationale can be criticised for justifying and, in certain circumstances, encouraging the use of exemplary sentences. The justification for exemplary sentences given by deterrence theorists is the 'aggressively' forward-looking aim of discouraging potential offenders from committing a similar crime as well as deterring the offender from recidivism.⁸⁵ In this way, exemplary sentences can

⁷⁷ *S v Blank* supra (n29) at 79C.

⁷⁸ *S v Blank* supra (n29) at 72I.

⁷⁹ *S v Howells* 1999 (1) SACR 675 (C) at 681D.

⁸⁰ *S v Gardener* supra (n26) at para 84.

⁸¹ *S v Gardener* supra (n26) at para 85.

⁸² *S v Assante* supra (n46) at 120B.

⁸³ *S v Assante* supra (n46) at 120C.

⁸⁴ A von Hirsch 'Proportionality in the philosophy of punishment' (1992) 16 *Crime and Justice: A review of research* 55 at 58.

⁸⁵ Von Hirsch op cit (n84) 65.

allow for offenders to be punished for future crimes, rather than the offence for which the offender is being sentenced.⁸⁶

An exemplary sentence places the interests of society above the rights of the individual, premised upon the notion that offenders forfeit their rights when they violate the rights of others.⁸⁷ There is a glaring absence of limits to justified punishment for both the innocent and the guilty.⁸⁸ The offender receives a sentence of increased severity and such an increase is not linked to the blameworthiness of the individual. In *S v Williams*,⁸⁹ Langa J criticised the imposition of exemplary sentences, warning 'against the idea that the accused is to be sacrificed on the altar of deterrence.'⁹⁰ Exemplary sentences are therefore problematic because of their disregard for individual human rights.

Other theoretical and empirical concerns with exemplary sentences have arisen from studies and observations of human nature. People are deterred by different prospective outcomes and at least one study has indicated offenders may have different psychological characteristics to non-offenders, precluding any accurate prediction of the deterrent success of exemplary sentences on the offenders.⁹¹ The theory of exemplary penalties is also dependent on the belief that the general public have a certain level of knowledge and therefore can be deterred by such exemplary punishments.⁹² In sum, there is a notable absence of evidence upon which a general policy of moral acceptability may be established.⁹³

A more recent argument against exemplary sentences derives from the Constitution. Developed in a number of cases, the test for exemplary sentences is that the injustice to the accused must not outweigh the broad interests of society.⁹⁴ Van Zyl Smit argues that a consequence of the constitutional principles of equality and proportionality could

⁸⁶ B Hudson *Understanding Justice* (1996) 25.

⁸⁷ AH Goldman 'Beyond the deterrence theory: comments on van den Haag's 'Punishment as a device for controlling the crime rate'' (1980-1) 33 *Rutgers Law Review* 721 at 723.

⁸⁸ Ibid.

⁸⁹ *S v Williams* 1995 (3) SA 632 (CC).

⁹⁰ *S v Williams* supra (n89) at para 85.

⁹¹ Hudson op cit (n86) 21.

⁹² S Terblanche 'Sentencing: affordable approaches' in I Glanz (ed) *Managing crime in the new South Africa* (2001) 222 at 231.

⁹³ Goldman op cit (n87) 721.

⁹⁴ *S v Khulu* 1975 (2) SA 518 (N) at 521B-H; *S v Matoma* 1981 (3) SA 838 (A) at 842H-843A; *S v Collett* 1990 (1) SACR 465 (A) at 470A-H; *S v Maseko* 1982 (1) SA 99 (A) at 102F; *S v Reay* 1987 (1) SA 873 (A) at 877C; *S v Sobandla* 1992 (2) SACR 613 (A) at 617F-H; *S v Potgieter* 1994 (1) SACR 61 (A) in D van Zyl Smit 'Sentencing and Punishment' in M Chaskalson et al (eds) *Constitutional Law of South Africa* 2ed (2004) 49-21.

mean that the test for exemplary sentences becomes stricter.⁹⁵ The emphasis on proportionality in the Constitution⁹⁶ as well as in the recent South African Law Reform Commission *Report on a New Sentencing Framework*⁹⁷ indicates that retribution is a preferable sentencing theory. The central tenet of retribution is the constitutional principle of proportionality between the seriousness of the offence and the culpability of the offender, and the gravity of the sentence.⁹⁸ Therefore, the frequent reference to deterrence in sentencing white-collar criminals, whether it is a significant factor or mere lip-service, should be discouraged for fear of producing disproportionate, and therefore unconstitutional, sentences.

An emphasis on deterrence may be one of the factors that has led the courts to disregard more appropriate sentences than imprisonment in sentencing white-collar criminals. In *S v Howells*,⁹⁹ Van Heerden AJ considered the case of a divorced mother of three children who was convicted to four years' imprisonment for fraud from her employer totalling R100 000 over a period of two years. An important aggravating factor was that the accused had already been convicted of fraud in 1989 and yet, surprisingly, the court felt it was still appropriate to emphasise the need for deterring fraud and theft by persons in fiduciary positions.¹⁰⁰ Evidently, the earlier conviction appeared not to have had a deterrent effect on the aforementioned offender.

While deterring crime is a valid and necessary function of criminal sentences, the court in *Howells* should rather have focused on the proportionality of the sentence for the offence. The judgment is unsatisfactory not simply because of the reference to deterrence but also regarding an almost impetuous response in the choice of sentence being imprisonment. The factors weighed by the court in a case of white-collar crime need not lead to an automatic decision of imprisonment, even taking into account the prevalence of white-collar crime and the need to address it.

⁹⁵ Ibid.

⁹⁶ Constitution of the Republic of South Africa, 1996.

⁹⁷ South African Law Reform Commission Report (Project 82) *Sentencing (A New Sentencing Framework)* (2000) at para 3.1.4.

⁹⁸ A von Hirsch 'Proportionate sentences: a desert perspective' in A Ashworth and A von Hirsch (eds) *Principled Sentencing: Readings on Theory and Policy* (1998) 168 at 172.

⁹⁹ *S v Howells* supra (n79).

¹⁰⁰ *S v Howells* supra (n79) at 681D.

PART IV: INCREASED USE OF COMMUNITY SENTENCES FOR WHITE-COLLAR OFFENDERS

The South African cases discussed in Part III illustrated that imprisonment is the sentence of choice when it comes to white-collar criminals. Part IV will show the need for change. There are other punishment options available for white-collar criminals besides imprisonment. Until recently, non-custodial options, particularly community penalties, have been largely under-utilised by South African courts, but the increasing awareness of overcrowding in prisons and the growing emphasis on restorative justice appear to be drawing attention to the development and utilisation of community penalties.

Community penalties are defined as 'non-custodial options that restrict the offender's liberty in some way'¹⁰¹ and therefore cover a wide range of punishment. The restorative element of community penalties and the absence of violence in white collar crimes make community sentences appropriate punishments for certain white-collar crimes. However, there are obstacles to the effective and more frequent use of community penalties, starting with the perception that community penalties are 'soft' punishment, the theoretical framework for community penalties and their practical implementation.

The case against imprisonment

The recent cases in the United States of America indicate an increasing prevalence and indeed prosecution of large-scale white-collar crime. A similar increased interest in prosecuting white-collar crimes occurred after the resolution of the Watergate scandal in the early 1980s.¹⁰² At present, it appears that the initial cases of Enron have resulted in the furious and harsh sentencing of those responsible for subsequent white-collar crimes in the cases of John and Timothy Rigas of Adelphia Communications and Bernard Ebbers of Worldcom, amongst others.¹⁰³ A simple comparison of their sentences and the dollar loss involved indicates not only the seriousness of their crime, but also the severity of

¹⁰¹ S Rex *Reforming Community Penalties* (2005) at 1.

¹⁰² J Gustafson 'Cracking down on white-collar crime: An analysis of the recent trend of severe sentences for corporate officers' (2005-6) 40 *Suffolk University Law Review* 685 at 690.

¹⁰³ Gustafson op cit (n102) 694.

their sentences.¹⁰⁴ Severe sentences are appropriate for serious cases of white-collar crime, provided that the sentences remain proportionate.

However, imprisonment is not the sole option for white-collar criminal offenders and should not be the default option for courts sentencing them. An instinctive resort to imprisonment should be vehemently opposed in spite of the minimum sentencing legislation prescribing the imposition of lengthy sentences of imprisonment for cases of white-collar crime.¹⁰⁵

The use of imprisonment is a serious infringement of constitutional rights, with the purpose being deprivation of the offender's liberty.¹⁰⁶ Combined with the constitutional considerations around custodial sanctions, there are empirical and pragmatic problems. The primary empirical criticism is that the punishment of imprisonment has not been proven to have a significant deterrent impact on the level of white-collar crime in spite of the courts' frequent reference to its deterrent value.¹⁰⁷ Neither has imprisonment had much, if any, rehabilitative or restorative effect.¹⁰⁸

The pragmatic concerns are numerous and include the costs of imprisonment, safety of offenders and integration of offenders back into society.¹⁰⁹ In the United States of America, Kahan records that imprisonment remains the most costly form of punishment.¹¹⁰ The situation in South Africa paints a similar picture of immense expense associated with sentences of imprisonment. For the R11,3 billion budget of the Department of Correctional Services in 2007/8, the functioning of the 237 prisons in South Africa, continues to be a large expense.¹¹¹

The Annual Report of the Judicial Inspectorate of Prisons hints at another practical issue related to the cost of imprisonment — overcrowding. According to this report, the national average occupation

¹⁰⁴ John Rigas received a sentence of 15 years' imprisonment at 80 years of age and his son, Timothy, 20 years' imprisonment for concealing debt of 2.3 million dollars. *US v Rigas* CA2 (NY), 2007. Ebbers received 25 years imprisonment for accounting fraud resulting in a loss of billions of dollars. *Gustafson op cit* (n102) 695.

¹⁰⁵ For example, s 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 requires the High Court to impose a sentence of not less than 15 years for a first-time offender who commits a crime in Part II of Schedule 2, such as fraud, without deviation except in substantial and compelling circumstances.

¹⁰⁶ *Van Zyl Smit op cit* (n94) 46-9.

¹⁰⁷ See *S v Blank* supra (n29), *S v Howells* supra (n79) and *S v Gardener* supra (n46) above.

¹⁰⁸ *Szockyj op cit* (n27) 501.

¹⁰⁹ *Szockyj op cit* (n27) 502.

¹¹⁰ Kahan refers to the cost to the state of each prisoner in 1996 in most states being \$20 000, using the statistics of the Criminal Justice Institute in 'Alternatives to Incarceration' (1998) 111 *Harvard Law Review* 1863 at 1893.

¹¹¹ Judicial Inspectorate of Prisons *Annual Report 2006/7: Prisoners and Prisons* (2007) 10.

level of South African prisons is 140,2% of the capacity for which the respective prisons was intended.¹¹² Recently, the South African courts too have joined in their criticism of the deplorable levels of overcrowding.¹¹³ Thus, alternatives to imprisonment in the form of non-custodial sanctions must be correctly formulated and used in order to effectively reduce the issue of over-crowding.

White-collar crime and community sentences

There is sound theoretical and pragmatic reasoning to pursue non-custodial sanctions in the cases of white-collar crime. There are several forms of non-custodial sanctions of which the most common types are fines and community penalties.¹¹⁴ Under the banner of community sentences can be found a great variety of sentences with the 'connecting thread' between imprisonment and the community sentences being the 'restriction of liberty.'¹¹⁵ For example, a sentence for a minor case of white-collar crime may be to restrict the offender in his or her freedom of movement, allowing the offender to travel only between a place of employment and habitation for a number of years.

Defence counsel have often argued for a community sentence, citing its appropriateness for white-collar criminals. The counsel for the accused in *S v Blank* claimed such a sentence holds two specific advantages for both society and the individual: its appropriateness for crimes of a non-violent nature and its rehabilitative orientation.¹¹⁶

First, as mentioned in Part I, incidents of white-collar crime do not normally involve violence.¹¹⁷ Offenders are therefore classified as non-violent and should be considered very readily by the courts for sentences of community penalties on this basis. From a theoretical perspective, Duff argues that by allowing offenders to remain in the community, community sanctions are able to communicate censure of the offender's behaviour to the public, but also remind the offender of their abuse of the trust underpinning society and harmful criminal

¹¹² Judicial Inspectorate of Prisons op cit (n111) 11.

¹¹³ Sachs J in *S v M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 539 (CC) at para 51. Kahan op cit (n110) recognised the pressing issue of over-populated prisons in the United States of America and also advocated use of alternative penalties as part of the solution at 1898.

¹¹⁴ See D Botha 'Increased fines for insider trading: A realistic deterrent?' (1990) 107 *South African Law Journal* 504 for a short discussion of the effectiveness of fines in the context of insider trading in South Africa.

¹¹⁵ S Rex 'Applying desert principles to community sentences: Lessons from two Criminal Justice Acts' (1998) *Criminal Law Review* 381 at 382.

¹¹⁶ *S v Blank* supra (n29) at 78H.

¹¹⁷ See Part II.

conduct.¹¹⁸ As the court noted in *S v Blank*, white-collar crime often appears to be tolerated in certain occupational and social contexts, therefore the communicative function of community penalties could challenge the attitudes of the individuals in these contexts.¹¹⁹

Second, as skilled workers, white-collar criminals are positioned to make a positive contribution to society and be rehabilitated into society. As mentioned previously, the case of *S v Howells*¹²⁰ involved a fraud offender sentenced to four years' imprisonment. The accused appealed against the High Court decision in the Supreme Court of Appeal, but in a short, unreported judgment, Streicher JA found the sentence imposed by the court a quo appropriate.¹²¹ He emphasised that although the accused had 'obvious potential to be a good employee',¹²² she had failed to gain insight from the receipt of the fine for fraud in 1989. These circumstances may have presented an ideal opportunity for the court to order a community penalty, as opposed to instinctively imposing imprisonment. This would have allowed for the punishment to play a rehabilitative role for the recidivist offender.

It would appear as if the dismissal of the community supervision in *Howells*¹²³ was perhaps due to a misunderstanding of the punitive nature of community penalties. It may also have been partly due to an aversion towards the present formulation of the sentence of community supervision in terms of s 276(1)(b) of the Criminal Procedure Act.¹²⁴ The overriding concern may have been whether the Department for Correctional Services is equipped with adequate resources for the effective implementation of community penalties. Regardless of the underlying reasons, community sentences, while still requiring further attention and perhaps, more detailed thought in South African policy and legislation, should be used more frequently.

Fortunately, where the Supreme Court of Appeal failed to take up the challenge in *Howells v S*,¹²⁵ the Constitutional Court has given fresh impetus to community sentences in the context of white-collar crime in the recent case of *S v M*.¹²⁶ In this matter, Sachs J was called upon to consider the case of a recidivist offender convicted of credit card fraud to a sentence of four years' direct imprisonment. He found that a sentence of correctional supervision was more appropriate in the

¹¹⁸ Rex op cit (n101) 21.

¹¹⁹ *S v Blank* supra (n29) at 72I.

¹²⁰ *S v Howells* supra (n79).

¹²¹ *Howells v S* [2000] JOL 6577 (A).

¹²² *Howells v S* supra (n121) at para 6.

¹²³ *Howells v S* supra (n121).

¹²⁴ Criminal Procedure Act 51 of 1977.

¹²⁵ *Howells v S* supra (n121).

¹²⁶ *S v M* supra (n113).

circumstances. Taking into account the three months of imprisonment the accused had already served awaiting trial, he converted the rest of the sentence into a community sentence. Of particular relevance is the emphasis placed on the 'multifaceted approach to sentencing' offered by correctional supervision because it comprises 'elements of rehabilitation, reparation and restorative justice'.¹²⁷ Sachs J also drew attention to the flexibility and adaptability of correctional supervision, which does not prescribe a specific sentence but 'is a collective term for a wide range of measures...executed within the community'.¹²⁸

This support for community supervision is but the beginning of a process to make community penalties more prominent in the sentencing of white-collar criminals in South Africa. Its impact will be felt too in other types of crime as the judgment provides the necessary encouragement for lower courts to use community sentences in more areas than white-collar crime. However, the Constitutional Court stopped short of suggesting changes to be made to the current under-utilised community sentences, but rather focused on promoting their use. This leads one to consider the manner in which community penalties are to achieve prominence in cases of white-collar crime.

In this respect, there are two key challenges facing the South African criminal justice system in attempting to use community sentences, which in turn prevent the utilisation of community sentences in cases of white-collar crime. These challenges concern firstly, the perception of community penalties as 'soft' punishment and, secondly, the necessary theoretical understanding and practical implementation of community penalties.

Community penalties — a 'soft punishment'

The first challenge with regard to community penalties is the altering of the public and judicial conception that they are not punishment or effective sanctions and the reluctance of the court to use them.¹²⁹ In the circumstances of *S v Blank*, Grosskopf JA refused to issue a community sentence because even a 'semi-custodial' sentence would have been 'totally inadequate',¹³⁰ to indicate the seriousness of the crime. This case reflects the perception of the courts of community penalties as promoting leniency and providing a 'soft' punishment. Even critics of imprisonment, who realise the rehabilitative potential of community supervision, argue that community penalties should only be considered

¹²⁷ *S v M* supra (n113) at para 59.

¹²⁸ *S v M* supra (n113) at para 60.

¹²⁹ *Rex op cit* (n115) at 382.

¹³⁰ *S v Blank* supra (n29) at 78G.

alongside a short period of imprisonment for white-collar criminals to ensure sufficient deterrent effect.¹³¹

Community penalties, even without any additional custodial period in a sentence, can provide an effective and proportional punishment for white-collar crime. Rex points out that community penalties do not place the same restrictions on the liberty of an offender as imprisonment but, if they did, they would simply be 'another form of custodial sentence'.¹³² Expressing the sentiments of Sachs J in *S v M*, community supervision is not a lenient sentence in comparison to imprisonment because, depending on the circumstances, it can be very restrictive and therefore punitive.¹³³

The restrictive nature of community penalties, and the manner in which to consider their severity, becomes apparent when emphasis is placed on the correct theoretical approach. Von Hirsch suggests viewing the onerous nature of sentences as 'the degree to which those sanctions interfere with people's interests' and then ranking the penalties 'according to how they typically impinge on persons' "living standard".¹³⁴ The living standard is not personalised to investigate injury to a particular individual but relates to the 'standardized means or capabilities for a good life',¹³⁵ and comprises both economic and non-economic interests. This flexible manner of viewing community sentences supports their effectiveness as a punishment and also offers the courts a conceptual tool with which to re-consider community sentences and gauge their severity.

Implementing community sentences

The second challenge is the broader theoretical framework for, and the practical implementation of, community penalties. There is a need for a relatively simple way for the court to mete out and implement such sentences. There will be cases of severe white-collar crime, warranting sentences of imprisonment; the difficulty surrounds the determination of the appropriate circumstances for the imposition of a community sentence and the form which it should take.

Von Hirsch, Wasik and fellow retributivists have attempted to show how non-custodial sentences can be accommodated within a sentence-

¹³¹ See M Benson 'White-collar offenders under community supervision' (1985) 2 *Justice Quarterly* 429 at 437.

¹³² Rex op cit (n115) quoting the Home Office White Paper 'Crime, Justice and Protecting the Public', Cmnd 965 (1990, HMSO) para 4.1 at 381.

¹³³ *S v M* supra (n113) at para 62.

¹³⁴ A von Hirsch 'Seriousness, severity and the living standard' in Von Hirsch and Ashworth op cit (n98) 185 at 189.

¹³⁵ Von Hirsch op cit (n134) 190.

ing framework based on desert principles, positing them as sentences of intermediate severity.¹³⁶ According to the principle of proportionality, central to South African sentencing and the desert rationale, the severity of penalties must be proportionate to the seriousness of the crime and the culpability of the offender.¹³⁷ In order to have a scale of increasing severity of punishment, one must recognise the severity of full custody — it is the most severe punishment to be administered by the South African criminal justice system.

Retribution demands that serious crimes are to be punished with the most severe sentence, therefore offenders who commit serious white-collar crimes must receive a severe but proportional sentence of imprisonment.¹³⁸ The unconstitutionality of an exemplary sentence should be avoided using the principle of proportionality. Yet, for less serious cases of white-collar crime, the temptation to impose incarceration should be resisted and community sentences should be used.

However, the use of the scale of severity provided by retributive theory does not provide guidance as to when the courts should contemplate issuing a community sentence and the form which the sentence should take. In consideration of these questions, the experience of the United Kingdom may prove instructive for the South African criminal justice system. There has been notable support for community sanctions as punishments of intermediate severity in a desert-based framework in various Criminal Justice Acts of the United Kingdom. The Criminal Justice Act 1991 attempted to implement a hybrid framework inspired by the model of Wasik and Von Hirsch, favouring crime prevention alongside the desert model.¹³⁹ The Act had little success and in fact, dented the popularity of, and confidence in, community sentences.

The origin of the 1991 Criminal Justice Act was a realisation that simply telling courts to impose community sentences more frequently because they are cheaper than imprisonment was not sufficient to address the bias against them.¹⁴⁰ The Act served to introduce a proliferation of community sentences, which were options from which the judicial officer selected the sentence 'most suited for the offender and imposed restrictions on liberty commensurate with the seriousness of the offence'.¹⁴¹ Some of the difficulties lay in the lack of definition for

¹³⁶ See the present report from the South African Law Reform Commission *op cit* (n97) for an indication of the direction in which South African sentencing policy should be going — it emphasises retribution as a central aim of sentencing.

¹³⁷ Von Hirsch *op cit* (n134)185.

¹³⁸ M Wasik and A von Hirsch 'Non-custodial penalties and the principle of proportionality' in von Hirsch and Ashworth *op cit* (n98) 279.

¹³⁹ Rex *op cit* (n101) 57.

¹⁴⁰ Rex *op cit* (n115) 382.

¹⁴¹ Rex *op cit* (n115) 383.

the concept of seriousness and the determination courts were forced to make as to when to prioritise proportionality when sentencing and when to emphasise suitability of the sentence to the offender.¹⁴² Rex argues that the proportionality requirement should have been made the primary restriction on the community order, with other criteria such as imposing a suitable order of secondary importance.¹⁴³

The 2003 Criminal Justice Act has taken a slightly different form, focusing on a single generic community sentence, although the essential principles remain the same — much to the disappointment of advocates of community penalties.¹⁴⁴ However, community sentences can still be revitalised as, in the opinion of some, the 1991 Act was ‘not really given an opportunity to work’¹⁴⁵ and the fundamental ideas of von Hirsch and Wasik linger in the 2003 Act. Hence the most recent legislation in the 2003 Act will be given an opportunity to challenge the present perceptions of community sentences. The attempt to incorporate theory and practice regarding community sentences indicates that this family of sentences has the potential to be fashioned into a workable sentence of punishment in South Africa too.

The South African courts should not be concerned that they bear the sole burden for changing the state of community sentences in this country, despite the clear need for a change in the perceptions of community sentences. Rather, there are a number of other parties on whom the responsibility rests. A lack of training and resources may be responsible for the infrequent use of the community penalties in South Africa. While community penalties may not elicit the costs equivalent to the financial burden of imprisonment, they do require support in the form of skilled manpower and the necessary systems to monitor offenders.

To promote this form of punishment and glean from the experience of the United Kingdom, accessible legislation covering community sentences in a more practical and effective manner would be a useful, and necessary, improvement. Such legislation could allow for two facets that are key to the sentencing of white-collar criminals: proportionality and flexibility. While proportionality is necessary for all sentences in our criminal justice system, flexibility has much to offer courts sentencing white-collar offenders. Section 276 of the Criminal Procedure Act combined with the various relevant regulations does not provide the variety that should be found in legislation concerning

¹⁴² Rex op cit (n101) 58.

¹⁴³ Rex op cit (n115) 384.

¹⁴⁴ Rex op cit (n101) 57.

¹⁴⁵ Rex op cit (n101) 59.

non-custodial sanctions, such as placing geographical or occupational restrictions on offenders, or even salary restrictions.

The worn-out sentencing principle that 'the sentence should fit the crime' has not had its desired impact in the area of community sentences for white-collar criminals. A community sentence could be utilised to cater for white-collar offenders as a more effective punishment than imprisonment and this potential must be uncovered by further resources pledged towards and research into, not only the community sentence, but also white-collar crime in South Africa.

CONCLUSION

The South African criminal justice system has reason to be concerned at the pervasiveness of white-collar criminal activity. Illegal conduct is often accepted as business 'culture',¹⁴⁶ as highlighted in the case of *Blank* and the line between legal and illegal behaviour in the occupational setting often appears blurred. The ambiguity surrounding the definition of white-collar crime is problematic in terms of providing a theoretical framework and especially in the assessment of its causes and regulation. This paper specifically dealt with cases of fraud and theft, although white-collar crime is reputed to involve a wide range of offences beyond these. However, a settled definition such as that of Croall placing white-collar crime in the context of the workplace is required by sentencing courts and policy-makers in South Africa in order to identify and deal with it.

The ambiguities surrounding white-collar crime do have a significant impact in the area of sentencing. The courts in South Africa have used a number of factors to decide what sentence to impose on white-collar criminals, and these factors appear to be similar to those identified by Stanton Wheeler and his colleagues in a study of courts in the United States of America. The main points of focus are the nature of the act and the variables related to the actor, as expressed in the paradox of leniency and severity.

An additional element present in the South African cases is a repeated emphasis on the need for deterrence and crime prevention to curb the incidence of white-collar crime. The courts have responded by imposing imprisonment with a heavy hand, disregarding the use of intermediate sanctions such as community penalties. Imprisonment appears to lack deterrent, rehabilitative and, at times, even retributive potential. The criminal justice system also faces the present dilemma of over-crowding in prisons therefore imprisonment is an expensive

¹⁴⁶ *S v Blank* supra (n29) at 721.

and undesirable sentence option. In *S v M*,¹⁴⁷ the Constitutional Court acknowledged the importance of other non-custodial options and this should provide the impetus for courts and policy-makers to consider the community sentence in a new light.

Contrary to popular and even judicial perceptions, community penalties offer a punitive and effective sanction. They blend elements of rehabilitation, restorative justice and retribution, helping the offender to reintegrate into the community. In particular, white-collar offenders are often economically viable and productive members of community who have not been convicted of a violent crime and are therefore easily re-integrated into society. Community penalties are suitable sentences for white-collar criminals because of these restorative aims.

Moreover, community penalties have the potential to be exceedingly restrictive, depending upon their content, and deprive offenders of the right to freedom of choice and movement in various justifiable ways. The perception of community penalties as 'soft' punishment stems from the issue of measuring the severity of these sentences. However, as von Hirsch has suggested, severity can be measured according to the degree to which the orders interfere with and restrict the freedom of the offender.

In addition, guidance for the theoretical framework and practical implementation of community sentences can be found in the ideas of Wasik and von Hirsch who emphasise the non-custodial sentence as a penalty of intermediate severity. The Criminal Justice Acts of 1991 and 2003 of the United Kingdom follow from these concepts and encourage the use of community sentences in a retributive system. These Acts suggest that a greater emphasis needs to be placed on community sentences in South Africa, both in terms of resources and research. Further research into community sentences to obtain the flexibility expressed in the Criminal Justice Acts¹⁴⁸ should ensure such sentences are viable and effective options for white-collar offenders, promoting a multi-dimensional approach to their sentencing. It is for the courts, legislators and policy-makers to take up the challenge of the Constitutional Court to utilise community sanctions more frequently. The increasing prevalence of white-collar crime and the state of overcrowding in South African prisons place a sense of urgency on the need to place greater resources into administering and investigating non-custodial sanctions in the context of sentencing white-collar criminals.

¹⁴⁷ *S v M* supra (n113).

¹⁴⁸ Criminal Justice Act of 1991; Criminal Justice Act of 2003.